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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 784

FRANKLIN L. BATTEN, *Petitioner,*

against

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner, FRANKLIN L. BATTEN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on October 15, 1964 and to review the Order of the said Court of Appeals entered on November 27, 1964, denying petitioner's Petition for Rehearing en banc, both

said orders affirming the judgment of the United States District Court for the District of Columbia, entered on April 9, 1964, and filed April 10, 1964.

OPINIONS BELOW

The judgment of the United States District Court for the District of Columbia is not reported and is printed in the appendix hereto, page 1a, infra. The opinions of the Court of Appeals is as yet unreported and is printed in the appendix hereto, page 2a, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on the order denying a rehearing on November 27, 1964. The jurisdiction of this Court is invoked under Title 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

1. Whether an investigation before a trial attorney for the Securities and Exchange Commission who was directed by order to make an investigation of certain matters, was an agency or departmental proceeding as defined by law.

2. Whether the evidence of record was sufficient to establish the guilt of petitioner beyond reasonable doubt as a matter of law and fact on both the count of subornation of perjury and the count of obstructing justice before an agency proceeding as defined by law.

3. Whether the alleged perjury was proven directly by the testimony of two independent witnesses or one independent witness and other corroborating evidence; and whether the testimony of the alleged perjurer can be considered to be the testimony of an independent witness.

STATEMENT OF THE CASE

Federal jurisdiction arose in this case when the petitioner, FRANKLIN L. BATTEN, was indicted by a Grand Jury of the District of Columbia upon the charges of violation of Title 18, U.S.C., Section 1505 and 1622. The first count charged him with corruptly influencing a witness before an agency proceeding by suborning said witness to commit perjury and the second count charged petitioner with the offense of subornation of perjury. Both counts arose from the same set of facts, that is, the alleged subornation of witness, Ralph J. Sines, to commit perjury before the said agency proceeding. Petitioner asserted in the trial court that the inquiry conducted by Clarence D. Ward was an investigation and not an agency proceeding.

On April 28, 1960, and at all other times herein, petitioner was president and 99% owner of the stock of Batten & Co., Inc., a broker-dealer firm. The records of said firm indicated that on April 28, 1960, Ralph J. Sines, brother-in-law of petitioner, purchased 1000 shares of Saber Boats, Inc. stock and this transaction was entered on the cash receipts journal on May 4, 1960, by Louise E. Purl, a bookkeeper for Batten & Co., Inc. She testified that she made this entry when petitioner indicated that payment of said stock was in his possession in the amount of $2,000.00. The cash disbursements journal of Batten & Co., Inc. reflected that on May 9, 1960, payment for the sale of the said stock by said Sines was entered and a check in the amount of $2,000.00 was drawn payable to Sines. The records of Batten & Co., Inc. show a deposit of $2,000.00 on May 10, 1960, in connection with the Sines transaction. William Keener, also employed as a bookkepper by Batten & Co., Inc., testified that he drew

the check to Sines while working on the Sunday prior to May 9, 1960.

The evidence of record indicated that the Securities and Exchange Commission ordered an investigation on October 6, 1960, which was conducted by Clarence D. Ward, a trial attorney assigned to the Washington, D. C., regional office of the Commission. While conducting this investigation, Mr. Ward questioned Ralph J. Sines the alleged perjurer, who testified on October 10, 1960, that he ordered the purchase and sale of 1000 shares of the said stock, Saber Boats, Inc., and that on October 11, 1960, he testified that statement was false, that he discussed the matter with the petitioner, and that petitioner told him to say that he, Sines, bought and sold the said stock. This was brought out on trial that petitioner contacted Sines in the latter part of September or early October, 1960, and informed him that he was a stockholder of Saber Boats, Inc. and that this stock had been sold and if he was contacted by anyone to tell them that he had bought and sold the stock. Subsequently, Sines was subpoenaed to testify before Clarence D. Ward and was accompanied by Guerry Moore, Esquire, whose services had been arranged by petitioner. Mr. Moore advised Sines to tell the truth and explained perjury to him after which Sines testified that he bought and sold the said stock. Mrs. Sines testified that she had no knowledge of the said purchase and sale of Saber Boats, Inc. stock. Upon completion of his investigation, Mr. Ward prepared and filed his report. On the 21st of November, 1960, an order of the Commission was issued purporting to direct a public proceeding to which petitioner was an interested party and said order and notice to petitioner was forwarded on said date by reg-

istered mail, citing therein Rule 17CFR 240.15 b-9 which states that petitioner was entitled in public and private proceedings to attend hearing and to examine the record to determine whether he would desire to be heard. At no time during the investigation conducted by Ward was petitioner advised of the investigation or afforded any of the rights spelled out by the above Rule. Petitioner has contended that the investigation herein was not in law or fact a proceeding before an agency or department of the United States Government and has contended that the first proceeding involving him was commenced on November 21, 1960.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit has decided serious and fundamental questions of law either not previously passed upon by this Court or such as should be reviewed by this Court, and has decided important questions involving the interpretation of Federal statutes which this Court should review.

The first question involved the proper application of the statutory offense of obstructing justice before an agency proceeding, which is prohibited in Title 18, U.S.C., section 1505, quoted in part, to wit:

> "—Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or attempts, or endeavors to influence, obstruct, or impede the due and proper administration of law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either

> house, or any committee of either House or any joint committee of the Congress—Shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

Petitioner contends that this statute clearly distinguishes between a proceeding and an investigation and specifically makes the alleged offense applicable to agency proceedings and Congressional investigations. This language excludes investigations conducted by Governmental agencies from its purview, the inclusion of which could have been established by Congress with minor additons to the Act.

Aside from the legal aspects of this case, an investigation has been proven to be far different, less formal and lacking in the basic concepts of due process that is provided in a proceeding before an agency. Obviously, the purpose of the investigation is to search out and discover evidence unhampered by Constitutional rights of an interested party and for this reason, should be viewed in its proper place, unclothed in the respectible garments of quasi-judicial process. As such, it occupies an important place in administrative policing of the various departments of the United States Government, but should not become an instrument of criminal justice without express statutory authority.

In determining the issue of this case, whether the inquiry of Ward was an investigation or a proceeding, the Court's attention is directed to the Administrative Procedure Act, Title 5, U.S.C., Section 1001 (g) which defines an "agency proceeding" as being the rule making, adjudication and licensing process of a particular agency. These functions are more particularly defined in Title 5, U.S.C., sections 1001 (c), (d) and (e), all of which disclose that the investigation of

Ward was in no way a proceeding against Petitioner but merely an investigation to determine whether a proceeding should be instituted naming the petitioner and others as interested parties.

The power to subpoena witnesses did not change the nature of the investigation but merely gave the investigator tools with which he could gather more effectively the facts to be presented in his reports. In addition, it is noted that in proceedings, a party is afforded the right of appeal to the proper Circuit Court of Appeals, however, it is equally clear that no appeal is afforded to an investigation which does not take action in any form against an interested party of an appealable nature. See Title 15, U.S.C., section 78y (a). Also, a person who participates as an investigator is not authorized to conduct a proceeding or to participate or advise in the decisions therein. Title 5, U.S.C., section 1004 (c). The Courts have defined "rule making" as being legislation on an administrative level within authority of the applicable statutes, and petitioner urges that adjudication and licensing functions of agencies are equally formal activities at the administrative level, none of which were designated functions of Ward in his order of investigation or otherwise. *Willapoint Oysters* v. *Ewing,* 174 F. 2d 676, 686, 693, *cert. den.* 338 U.S. 860, 70 L. Ed. 101. It is conceded that subpoenas issued incident to an investigation are not only proper but reasonable and a proper exercise of legislative function is felt to have been carried out in the statutory authority provided; however, this in no way should be construed to enlarge the scope of the criminal statute defining the offense charged herein. The Federal Trade Commission has been provided similar legislative powers and functions as has the

Securities and Exchange Commission in that both have been granted the authority to conduct investigations and proceedings. In the case of *Federal Trade Commission* v. *Miller's National Federation,* 60 App. D.C. 66, 67, 47 F. 2d 428, it was held that the quasi-judicial authority to institute a proceeding against anyone provides for complaint, notice, hearing and appropriate order and appeal of the agency ruling. In so defining a proceeding, the Courts have recognized that an investigation has a far different fundamental purpose and the Rules of the Commission have distinguished the application of formal proceedings from the conduct of investigation. Rules 3 (a), 13 (b) and 20 (a), Rules of Practice of the Securities and Exchange Commission.

Accordingly, the proper interpretation of Federal statutes are involved, having far reaching effects upon the fundamental rights of the petitioner, and that this Court ought to review same so that proper effect may be applied to the prosecution of offenses arising under Title 18, U.S.C. section 1505.

The remaining questions presented deal with the merits of both counts under which the petitioner was convicted in that the fact of perjury is an essential element to be proven in each of the two counts by legal and competent evidence beyond reasonable doubt. Proof of the fact of the falsity of the alleged testimony of Sines on October 10, 1960, must be established by the direct testimony of two independent witnesses or by one independent witnesses and others directly corroborating evidence. *Bridge* v. *United States,* 199 F. 2d 811, *reh. den.* 201 F. 2d 254; *Doan* v. *United States,* 202 F. 2d 674; *Culwell* v. *United States,* 194 F. 2d 808; *Segal* v. *United States,* 246 F. 2d 814. Proof

of the fact of perjury by one independent witness without directly corroborating evidence is insufficient. *United States* v. *Silverman,* 106 F. 2d 750. In the case before this Court, the only direct evidence that perjury may have been committed by Sines comes from Sines himself, which of course in some circles is considered to be the best source. On the other hand, he is not an independent witness, being personally interested in the matter before the Court. Once his testimony is disregarded, it is clear that no other evidence, either testimony or documentary, tends to prove the charge. Not even a strong suspicion could be established aliunde the testimony of Sines, which means that petitioner was convicted upon the uncorroborated testimony of Sines contrary to doctrine of an oath against an oath being insufficient to sustain a conviction.

Where evidence tends to prove the innocence as well as the guilt of an accused, the Court has the duty to acquit the accused. In the instant case, the proof of the falsity of the testimony given by Sines on October 10, 1960, is an indispensible element of proof and is the corpus delicti in the case. *Hammer* v. *United States,* 271 U.S. 620, 629, 70 L. Ed. 1118, 1121. To allow the prosecution the option of picking in its discretion either the testimony of October 10, or October 11, given by Sines as being the truth, places a latitude of discretion far broader than contemplated at law and further makes the alleged perjurer a very interested party in the prosecution of the petitioner, thus destroying any semblance of being an independent witness. For these reasons and other reasons as may be apparent to the Court, petitioner urges that the Court should grant the Writ of Certiorari and review the error of which petitioner complains.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

December 24, 1964.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

(Filed April 10, 1964)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 731-62

UNITED STATES OF AMERICA

v.

FRANKLIN L. BATTEN

Judgment and Commitment

On this 9th day of April, 1964, came the attorney for the government and the defendant appeared in person and by his counsel, F. Joseph Donohue, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation of Sections 1505, 1622, Title 18 of the U.S. Code as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Four (4) months to one (1) year and one (1) day on Count one, Four (4) months to one (1) year and one (1) day on Count two, said sentences to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant,

/s/ ALEXANDER HOLTZOFF
United States District Judge

The Court recommends commitment to Federal Correctional Institution at Danbury, Connecticut.

(Filed Nov. 27, 1964)

Order

On consideration of appellant's petition for rehearing *en banc*, it is

ORDERED by the Court *en banc* that appellant's petition is denied.

PER CURIAM

Dated: Nov. 27, 1964

(Filed Oct. 15, 1964)

Judgment

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel; and, it appearing to the court that there is no error affecting substantial rights, it is

ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this case is affirmed.

PER CURIAM.

Dated: Oct. 15, 1964